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COMMENTS

STANDING TO CONTEST FEDERAL APPROPRIATIONS: THE SUPREME COURT'S NEW REQUIREMENTS

by Lawrence D. Stuart, Jr.

Federal aid to education programs which provide assistance to religious as well as public schools arguably violate the establishment clause of the first amendment.[1] Unfortunately, the early Supreme Court case of *Frothingham v. Mellon*,[2] which held that federal taxpayers have no standing to contest federal appropriations, made it impossible for the validity of this charge to be determined by a court. Recently, however, the Supreme Court partially overturned the *Frothingham* doctrine, holding in *Flast v. Cohen*[3] that federal taxpayers have standing to question federal appropriations which allegedly violate the establishment clause. Moreover, the Court did not specifically restrict the types of appropriations which a federal taxpayer may challenge to those which transgress the establishment clause. Hence, the *Flast* decision not only is likely to presage litigation concerning the constitutionality of federal aid to education, but also may lead to constitutional challenges to other federal taxing and spending programs, particularly the tax-exempt status of religious organizations. This Comment discusses the basis of standing to contest government appropriations, the trend of the courts in dealing with this problem, and the implications of the *Flast* decision.

I. Conceptual Difficulties of Standing To Contest Government Appropriations

Although "standing to sue" encompasses a complicated mixture of federal and state constitutional and statutory requirements and court-made rules,[4] in both state and federal courts the traditional doctrine has been that the plaintiff has no standing unless he is injured or adversely affected by the legislation which he attacks.[5] In attempting to elucidate this principle,

[1] U.S. Const. amend. I. *See, e.g.*, L. Pfeffer, Church, State and Freedom (2d ed. 1967); Davis, *"Judicial Control of Administrative Action": A Review*, 66 Colum. L. Rev. 635 (1966).

[2] 262 U.S. 447 (1923).

[3] 392 U.S. 83 (1968).

[4] *E.g.*, United States *ex rel.* Chapman v. FPC, 345 U.S. 153 (1953); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945).

[5] *E.g.*, Horne v. Federal Reserve Bank, 344 F.2d 725 (8th Cir. 1965); United States v. Lauer, 287 F.2d 633 (7th Cir.), *cert. denied*, 368 U.S. 818 (1961); *Ex parte* Cregler, 56 Cal. 2d 308, 363 P.2d 305, 14 Cal. Rptr. 289 (1961); State v. Donahue, 141 Conn. 656, 109 A.2d 364, *cert. denied*, 349 U.S. 926 (1954); Huckaba v. Cox, 14 Ill. 2d 126, 150 N.E.2d 832 (1958).

It has been said that the functions of standing requirements are twofold—(1) to implement the separation of powers doctrine (*see, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring): "Regard for separation of powers . . . restricts the courts of the United States to issues presented in an adversary manner."; United Pub. Workers v. Mitchell, 330 U.S. 75 (1947)), and (2) to insure that courts review only adversary proceedings, in which the issues to be adjudicated are most clearly defined (*see, e.g.*, Arnold, *Trial by Combat and the New Deal*, 47 Harv. L. Rev. 913, 922 (1934): "These assumptions are reconciled with practical efficiency by the notion that the courts are more apt to formulate or apply

one court observed that a plaintiff, to have standing, must suffer an injury to a "private substantive legally protected interest . . . either of a 'recognized' character at 'common law,' or . . . created by statute."[6] This definition illustrates the two aspects of the standing concept. First, the plaintiff must be "substantially" injured or affected. If he is not, standing will be denied because of the legal maxim *de minimis non curat lex*.[7] Secondly, the injury must be "personal" to the plaintiff. Thus, a plaintiff generally has no standing to assert the rights of another,[8] or to contest a portion of a statute which does not affect him even though he *is* affected by another part of the statute.[9] In addition, if the plaintiff's injury or interest is not distinguishable from that suffered by "people generally," any "personal" right which he may have is extinguished.[10]

Because of the traditional standing precepts, a plaintiff has difficulty establishing his standing to question government appropriations. Admittedly, an illegal or unconstitutional appropriation would seem to injure or adversely affect all persons subject to the dominion of a government. But in order to have standing, the plaintiff must demonstrate that his interest in, or the injury caused to him by, the particular appropriation in question is "personal," that is, different from that of everyone else. In the ordinary case, where the appropriation is from general government funds, this cannot be done.[11] Moreover, even if the plaintiff could establish a "personal" injury, his standing to sue would be questionable. Although the collective harm caused by illegal or unconstitutional government spending may be great, the harm to any one person is likely to be slight and easily classified

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rules soundly if the opposite sides are prevented from sitting around a table in a friendly conference. . . . Bitter partizanship in opposite directions is supposed to bring out the truth."). However, it would seem that the use of "standing" as a device to prevent courts from usurping the power of the other branches of government is based upon a misconception. "Standing" is but one aspect of "justiciability." The latter term describes all the elements which make a matter fit for judicial determination; other aspects of "justiciability" (particularly the "political question" doctrine) adequately safeguard separation of powers. *See* notes 53, 71 *infra*, and accompanying text.

[6] Associated Indus. v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

[7] Translated, the term means "the law does not concern itself with trifles." *See, e.g.*, Porter v. Rushing, 65 F. Supp. 759 (W.D. Ark. 1946); Loeffler v. Roe, 69 So. 2d 331 (Fla. 1953); Sonnier v. United States Cas. Co., 245 La. 582, 157 So. 2d 911 (Cir. Ct. App. 1963).

[8] Barrows v. Jackson, 346 U.S. 249 (1953); Massachusetts v. Mellon, 262 U.S. 447 (1923). *Contra*, NAACP v. Alabama, 357 U.S. 449 (1958), where the NAACP was permitted to assert the constitutional rights of its members because such rights could be preserved only if they were litigated by a representative.

[9] *E.g.*, Bode v. Barrett, 344 U.S. 583 (1953); American Power & Light Co. v. Securities & Exchange Comm'n, 329 U.S. 90 (1946); Houston Oil Co. v. Lawson, 175 S.W.2d 716 (Tex. Civ. App. 1943), *error ref.*

[10] Frothingham v. Mellon, 262 U.S. 447, 488 (1923): "[Plaintiff must allege] some direct injury . . . not merely that he suffers . . . in common with people generally."; B. SCHWARTZ, THE SUPREME COURT 144-45 (1957): "Unless [the plaintiff] is adversely affected personally, as an individual, he is seeking only a judgment in the abstract upon the constitutionality of such an act. Such a proceeding . . . is not enough to call for the exercise of a court of its judicial power."

[11] If tax payments are "earmarked" for a particular appropriation, however, persons who pay the tax have standing to contest the appropriation. *See* United States v. Butler, 297 U.S. 1 (1936). *Butler* involved the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31, which attempted to support farm prices with a tax on processors of farm products. The Act called for the processors' tax payments to be channeled into a special treasury fund from which they were to be distributed to farmers who agreed to plant crops according to government instructions.

Moreover, even if the plaintiff is affected in a special way by an appropriation, as he would be if the money were given directly to him, he still could not contest the appropriation, because one has no standing to question legislation which benefits him. *E.g.*, *In re* Pittsburgh Rys., 113 F. Supp. 233 (W.D. Pa. 1953); Kent Club v. Toronto, 6 Utah 2d 67, 305 P.2d 870 (1957).

as *de minimis*.[12] Thus, a logical application of the traditional rules of standing would appear to preclude effectively a suit to contest government appropriations.

II. Standing To Challenge State and Municipal Expenditures

Despite traditional standing concepts, courts have devised a means to permit municipal and state appropriations to be tested judicially. The device through which such expenditures may be challenged is the taxpayer's suit.[13] In such suits, the courts distinguish taxpayers from "people generally," and thus overcome the traditional standing requirement that the plaintiff's injury or interest be "personal." However, the line which the courts seek to draw between the taxpayer and "people generally" is unconvincing, and it seems that a taxpayer's suit is nothing more than an artifice by which government appropriations may be challenged.[14]

The courts' attempts to fit the taxpayer into the role of a conventional plaintiff (*i.e.*, one who is "personally" and "substantially" injured) may be divided into two categories, although the courts themselves do not always recognize such a distinction in their reasoning.[15] Category one may be denominated the "financial interest" theory. According to this view, first used in suits against municipalities[16] but now also employed at the state level,[17] taxpayers' contributions to the local treasury give them a "personal" interest in municipal appropriations. Thus, a municipal or state taxpayer's suit is viewed as roughly analogous to a private stockholder's derivative suit against his corporation. The second rationale upon which the courts have predicated taxpayers' standing is the "financial injury" theory.[18] Courts following this theory reason that government misspending of tax money is wasteful and personally injures taxpayers by increasing their future tax payments.

At first blush, either theory of taxpayers' standing seems adequate, for under both, the "personal" and "substantial" facets of traditional standing precepts ostensibly are observed. However, neither rationale withstands

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[12] However, a large corporation's stake in a specific federal appropriation may be several million dollars, an amount which cannot be considered *de minimis* by any standard. *See* note 42 *infra*.

[13] State taxpayers' suits are at present apparently available in every state but New York. *See* St. Clair v. Yonkers Raceway, 13 N.Y.2d 72, 192 N.E.2d 15 (1963). Municipal taxpayers' suits appear to be available in every state but Kansas. *See* Asendorf v. Common School Dist. No. 102, 175 Kan. 601, 266 P.2d 309 (1954). *See generally* 3 K. Davis, Administrative Law Treatise § 22.09 (1958), §§ 22.09-.10 (Supp. 1965); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895 (1960).

[14] *See* notes 19-24 *infra*, and accompanying text.

[15] *E.g.*, Ethington v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948), where the court apparently applied both theories in a single case.

[16] *E.g.*, Sherlock v. Village of Winnetka, 59 Ill. 389 (1871); Shipley v. Smith, 45 N.M. 23, 107 P.2d 1050 (1940). *See generally* Comment, *Municipal Taxpayers and Standing To Sue*, 2 Buffalo L. Rev. 140 (1952).

[17] *E.g.*, Ethington v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948).

[18] Coyle v. Housing Authority, 151 Conn. 421, 198 A.2d 709 (1964); McKaig v. Mayor of Cumberland, 208 Md. 95, 116 A.2d 384 (1955); Azbill v. Lexington Mfg. Co., 188 Tenn. 477, 221 S.W.2d 522 (1949); Wright v. Nashville Gas & Heating Co., 183 Tenn. 477, 194 S.W.2d 459 (1946).

analysis. The "financial interest" theory, which apparently was imported from England,[19] rests upon the dubious premise that taxpayers have an interest in appropriations which is different from that of other persons. This assumption is surely fallacious, because tax moneys are collected and disbursed to benefit the general public,[20] not merely those persons who pay taxes. Thus, a taxpayer has no personal *interest* (*i.e.*, one different from that of any other person) which he can urge upon the court as a ground for standing to contest appropriations.

Taxpayers' standing under the "financial injury" theory is equally questionable when measured by traditional standards. The assumption of a financial injury due to future tax increases satisfies the traditional standing requirement that the plaintiff suffer a personal injury; however, his standing is still open to attack on the ground that it fails to meet the substantial injury requirement of traditional standing. The financial injury, if any, suffered by an individual taxpayer as a result of wrongful government appropriations is almost always so speculative and so small that it surely fits the *de minimis* category.[21] In some states, the courts have attempted to meet this problem by limiting taxpayers' suits to instances in which a substantial appropriation is involved.[22] Other states have enacted statutes which require a specified number of taxpayers to join together to bring suit.[23] By contrast, the courts in several states have ignored the *de minimis* problem and have allowed taxpayers to contest government action even where there is virtually no expenditure of funds.[24]

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[19] The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, *as amended*, 45 & 46 Vict., c. 50 (1882), required municipal officers to treat municipal funds as a public trust.

[20] Such an assumption at the municipal and state levels rests upon the fact that use of public improvements, made with tax money, is not restricted to those who contributed taxes. At the federal level, the assumption is buttressed by the General Welfare clause, although it has never been specifically interpreted to allow Congress to tax and spend "for the general welfare." With regard to a taxpayer's interest in tax moneys, Justice Harlan has noted:

> The simple fact is that no such rights can sensibly be said to exist. Taxes are ordinarily levied by the United States without limitations of purpose; absent such a limitation payments received by the Treasury in satisfaction of tax obligations lawfully created become part of the Government's general funds. The national legislature is required by the Constitution to exercise its spending powers 'to provide for the common Defense and general Welfare.' Art. I, § 8, cl. 1. Whatever other implications there may be to that sweeping phrase, it surely means that the United States holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large.

Flast v. Cohen, 392 U.S. 83, 118 (1968) (Harlan, J., dissenting).

[21] In this regard, it is important to distinguish between the "financial injury" theory and the "financial interest" theory. If the former is applied, the argument that a large corporation should have standing because it has a million dollar "interest" in a particular expenditure is of no moment. The only issue is whether the corporation's future taxes will be increased by the appropriation. *See* note 42 *infra*. Conversely, if the "financial interest" theory is employed, it seems that the taxpayer should not be denied standing because his injury is "*de minimis*." The size of the taxpayer's "interest" should be irrelevant. However, in Frothingham v. Mellon, 262 U.S. 447 (1923), the Court apparently adopted the "financial interest" theory of taxpayers' suits yet refused to grant a federal taxpayer standing because his "interest" in federal appropriations was not large enough. *See* notes 28-33, 42 *infra*, and accompanying text.

[22] *E.g.*, Bassett v. Desmond, 140 Conn. 426, 101 A.2d 294 (1953); Ryan v. City of Chicago, 369 Ill. 59, 15 N.E.2d 708 (1938); Azbill v. Lexington Mfg. Co., 188 Tenn. 477, 221 S.W.2d 522 (1949); Goodland v. Zimmerman, 243 Wis. 459, 10 N.W.2d 180 (1943).

[23] MASS. ANN. LAWS ch. 29, § 63 (1966) (twenty-four taxpayers to enjoin state appropriations); MASS. ANN. LAWS ch. 40, § 53 (1966) (ten taxpayers to enjoin municipal appropriations); ME. REV. STAT. ANN. tit. 30, § 2251 (1964) (ten taxpayers to enjoin municipal contract violating conflict of interest statute).

[24] *E.g.*, Clapp v. Town of Jaffrey, 97 N.H. 456, 91 A.2d 464 (1952); Vibberts v. Hart, 85

III. Taxpayers' Standing To Contest Federal Appropriations—The Frothingham Rule

In 1899 a federal taxpayer sued to enjoin the disbursement of federal funds to a religious hospital,[25] claiming that such action violated the establishment clause of the first amendment. The Supreme Court passed over the question of the petitioner's standing to sue and ruled on the merits of the case, thus inferring that federal taxpayers' standing was a reality. However, in 1907 when a federal taxpayer sued to enjoin the construction of the Panama Canal,[26] the Court apparently had second thoughts about allowing federal taxpayers' suits. Again the Court heard the merits of the case, but in reference to the contention that the taxpayer lacked standing to sue, the Court stated: "We do not stop to consider these or other kindred objections; yet passing on them in silence must not be taken as even an implied ruling against their sufficiency."[27] Thus, it was not clear if the federal courts were willing to adopt the taxpayer's suit as a device to permit challenges to federal appropriations.

The fate of the federal taxpayer was finally resolved in 1923 in the famous case of *Frothingham v. Mellon*.[28] Mrs. Frothingham questioned the constitutionality of the Maternity Act of 1921,[29] which provided for federal payments to the states to help combat childbirth mortality. Her contention was that the Maternity Act was an infringement upon the powers reserved to the states by the Constitution, that any appropriation made under the Act was therefore unconstitutional, and that the unconstitutional appropriations would increase her future tax burden, thereby taking her property without due process of law. The Supreme Court held that the plaintiff's position as a federal taxpayer did not, by itself, give her standing to contest the appropriations of the federal government.

In disposing of *Frothingham*, the Court used language involving both the "substantial" and "personal" requirements of the traditional standing doctrine. Distinguishing the case from the traditional taxpayer's suit against a municipal government, the Court stated that the municipal taxpayer has a "direct and immediate"[30] interest in municipal expenditures, the relationship being "not without some resemblance"[31] to that existing between stockholder and private corporation. On the other hand, the Court observed, a federal taxpayer's interest "in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is very] remote, fluctuating, and uncertain."[32] Thus, in denying the fed-

R.I. 35, 125 A.2d 193 (1956); Lein v. Northwestern Eng'r Co., 74 S.D. 476, 54 N.W.2d 472 (1952); Miller v. City of Pasco, 50 Wash. 2d 229, 310 P.2d 863 (1957).

[25] Bradfield v. Roberts, 175 U.S. 291 (1899).

[26] Wilson v. Shaw, 204 U.S. 24 (1907). For another case in which the Supreme Court accepted jurisdiction in a taxpayer suit, see Millard v. Roberts, 202 U.S. 429 (1906).

[27] Wilson v. Shaw, 204 U.S. 24, 25 (1907).

[28] 262 U.S. 447 (1923).

[29] Ch. 135, 42 Stat. 224 (1921).

[30] Frothingham v. Mellon, 262 U.S. 447, 486 (1923).

[31] *Id.* at 487.

[32] *Id.*

eral taxpayer standing to sue, the Court apparently adopted the "financial interest" view of taxpayer suits,[33] but concluded that although a municipal taxpayer had a personal interest in municipal funds, a federal taxpayer had no such interest in federal expenditures.

IV. Federal Court Review of State and Municipal Taxpayers' Suits

Despite the fact that the Supreme Court would not entertain a federal taxpayer's action, the Court, subsequent to *Frothingham*, did review a state taxpayer's suit challenging state appropriations. In *Everson v. Board of Education*,[34] a state taxpayer claimed that a New Jersey statute authorizing free transportation for parochial school children violated the establishment clause. Curiously enough, on appeal from state court, the Supreme Court heard the case on the merits without considering the question of the taxpayer-plaintiff's standing to sue.

Later however, in *Doremus v. Board of Education*,[35] the Court squarely faced the issue of federal court review of state taxpayers' suits. In *Doremus* a state taxpayer sued to enjoin Bible reading in public schools, claiming that such readings constituted the establishment of religion. On appeal to the Supreme Court, the petitioner relied upon *Everson* as the basis for his standing to sue. However, the Court rejected this contention, noting that a state taxpayer's action was available only to remedy unconstitutional acts which result in "direct pecuniary injury."[36] Everson had been granted standing because he showed "a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of."[37] Since Doremus could show no "measurable" disbursement of funds caused by the Bible reading, the Court concluded that he had no standing to sue.

In spite of the Court's seemingly plain language in *Doremus*, the guidelines for federal court review of state taxpayers' suits remain confused and unclear. When applied to the facts of *Doremus*, the Court's emphasis on the amount of government spending involved is particularly misleading. Since the state of New Jersey was almost certainly spending a substantial sum of tax money on its public schools, it seems that Doremus, by alleging that religion was being established in the public schools, demonstrated the "measurable" disbursement of public funds required to give him standing to sue. However, the *Doremus* Court, in its search for disbursement of

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[33] *See* notes 16 and 17 *supra*, and accompanying text.

[34] 330 U.S. 1 (1947).

[35] 342 U.S. 429 (1952). The *Everson* and *Doremus* cases have created a situation in which a state court can make a constitutional determination which is unreviewable by the Supreme Court. If a taxpayer suit is brought in a state court which has no requirement that the taxpayer-plaintiff suffer pecuniary damage in order to have standing (*see* note 24 *supra*, and accompanying text), the state court may proceed to the merits of the case. But such a suit cannot be appealed to the Supreme Court unless the plaintiff meets the higher standing requirement of a "good-faith pocketbook injury" as set out in *Doremus*. One unique solution to the above problem would be to make "standing to raise a federal constitutional question, itself a federal question, so that it will be decided uniformly throughout the country." P. Freund, Supreme Court and Supreme Law 35 (Cohn ed. 1954).

[36] Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

[37] *Id.*

funds, apparently focused only upon the particular activity in question (Bible reading) and considered the overall amount spent on the school system irrelevant. Thus, *Doremus* most likely stands for the proposition that a state taxpayer has standing in federal court only if he demonstrates that the particular state activity he is attacking has caused a "measurable" disbursement of state tax money.

V. THE EFFECT OF FROTHINGHAM AND DOREMUS

The *Frothingham* and *Doremus* decisions created profound confusion in the law regarding taxpayers' standing in federal court. Much of this confusion arose from the Supreme Court's changing view as to the nature of a taxpayer's suit. In *Frothingham* the Court seemingly subscribed to the "financial interest" fiction[38] and distinguished municipal and federal taxpayers' suits (with no mention of state taxpayers' suits) on the ground that the taxpayer's "interest" in federal tax moneys was too remote. However, in *Doremus* the Court evidently shifted fictions,[39] ruling that all taxpayers' suits (municipal, state, and federal) would be reviewable by the Court if they formed a "good-faith pocketbook action"[40] resulting from direct pecuniary "injury." But the *Doremus* Court was careful to reiterate that a federal taxpayer could not show such an injury.

As discerned from *Frothingham* and *Doremus*, the law seemed to be that federal courts could review some municipal and state taxpayers' suits, but that they could never entertain a federal taxpayer's action. The ban on federal taxpayers' suits created a special problem with regard to federal aid to education programs providing for federal payments to religious as well as to public schools. Although it was arguable that such payments violated the first amendment prohibition regarding the establishment of religion, no one had standing to litigate this issue.[41] This fact, as well as the generally inconsistent treatment of municipal or state and federal taxpayers' suits, precipitated attacks by legal commentators,[42] some of whom called for a

[38] *See* notes 16 and 17 *supra*, and accompanying text.

[39] *See* note 18 *supra*, and accompanying text.

[40] Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

[41] A taxpayer, or "citizen," is the only possible plaintiff to contest federal aid to religious schools. The situation must be distinguished from Abington School Dist. v. Schempp, 374 U.S. 203 (1963), and similar cases in which plaintiffs attacked prayer and other alleged establishments in the public schools. In those cases, the Court found that the plaintiff's children were injured personally because the recitation of prayer and other alleged establishments indirectly coerced them to conform to the religious beliefs of the majority. Conversely, aid to religious schools benefits the children who attend and their parents, and one has no standing to contest legislation which benefits him. *See, e.g., In re* Pittsburgh Rys., 113 F. Supp. 233 (W.D. Pa. 1953).

[42] The *Frothingham* Court's attempt to distinguish federal and municipal taxpayers' suits on the ground that a federal taxpayer's interest in federal funds is "minute" has come under heavy attack. The writers' premise seems to be that although the basis of a municipal or state taxpayer's suit (a "personal" interest of the taxpayer) is a fiction, the fiction is equally applicable to federal taxpayers' actions. *See generally*, Comment, *supra* note 13, at 917 n.127; Davis, *Standing To Challenge Governmental Action*, 39 MINN. L. REV. 353, 387 (1965):

> The Court's major idea that a municipal taxpayer has a larger and more direct stake in a municipal expenditure than a federal taxpayer has in a federal expenditure . . . is now contrary to the facts. General Motors in a recent year paid well over a billion dollars in federal taxes. This means that General Motors has about a two per cent stake in every federal expenditure. When the federal government undertakes a program involving an expenditure of ten billion dollars, the General Motors portion is about two hundred million dollars—hardly a minute sum in an absolute sense.

reversal of the *Frothingham* rule.[43] However, before such a result could be obtained, a key question left untouched by *Frothingham* had to be answered favorably.

The jurisdiction of federal courts, unlike that of state courts, is limited by article III of the Constitution to "cases" and "controversies."[44] Thus, at times federal standing is denied because of the case or controversy limitation, while on other occasions a case or controversy may exist, yet standing is denied because of court-made rules. Unfortunately, in *Frothingham* the Court did not specifically address itself to the issue of whether Mrs. Frothingham was denied standing because a federal taxpayer's suit did not form an article III case or controversy, or merely because she failed to meet the court-made test of "standing to sue." If the basis of *Frothingham* was the article III limitation on the jurisdiction of the federal courts, no federal taxpayer's action could ever be maintained. On the other hand, if *Frothingham* was only a "court-made rule" decision, federal taxpayer standing could exist, provided federal taxpayers were found to have a "personal" interest in federal appropriations.

At first blush, the *Frothingham* opinion seems to support the view that a federal taxpayer's suit does not constitute a case or controversy.[45] However, the Court's attempt to distinguish municipal and federal taxpayers' suits and its statement that federal court review of a municipal taxpayer's action "is not inappropriate"[46] indicate that the Court considered the municipal taxpayer's suit within the purview of article III. Thus, the implication was that a federal taxpayer's suit could create a case or controversy if the taxpayer's interest in federal moneys were "personal." Later, *Everson* and *Doremus* provided further support for this view. In order for the Court to hear those cases it had to find that a state taxpayer's suit constituted an article III case or controversy. Moreover, in *Doremus* the Court clearly enunciated this proposition.[47] The fact that both municipal and state taxpayers' actions could, under the proper circumstances, create a case or controversy augmented the conclusion that a federal taxpayer's suit could form one also. Thus, it seemed likely that there was no constitutional barrier to a federal taxpayer's action;[48] however, the basis of the *Frothingham* ban on federal taxpayers' suits remained an unresolved question for forty-five years.

The answer to this argument is that General Motors' interest in tax moneys is no different from that of any other "person." *See* notes 20, 21 *supra*, and accompanying text.

[43] *See* L. PFEFFER, *supra* note 1; Davis, *supra* note 42.

[44] U.S. CONST. art. III, § 2.

[45] The Court stated: "To [decide this case] would not be to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department—an authority which we plainly do not possess." Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

[46] *Id.* at 486.

[47] "It is true that this Court found a justiciable controversy in *Everson v. Board of Education* . . . ." Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

[48] *See, e.g., Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing To Bring Suit*, 12 BUFFALO L. REV. 35, 48-65 (1962); Davis, *supra* note 42, at 389-91; Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302-03 (1961); *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 465 (1966).

VI. FLAST v. COHEN—A NEW TEST FOR FEDERAL TAXPAYERS' STANDING

In *Flast v. Cohen*[49] the constitutionality of the Elementary and Secondary Education Act of 1965,[50] which authorizes federal payments to finance guidance services and classroom instruction in religious as well as public schools, was at issue. The petitioner, a federal taxpayer, argued that the portions of the Act authorizing such payments violated the establishment clause. However, a three-judge federal court, relying on *Frothingham*, held that the plaintiff had no standing to sue and summarily dismissed her complaint.[51] Although that court admitted that *Frothingham* had often been criticized, it nevertheless felt bound to apply the "no-standing" rule in light of the fact that "the case [had] never been overruled or limited by the Supreme Court."[52]

On appeal, however, the Supreme Court squarely faced the question that had been so long debated by legal scholars: was the *Frothingham* ban on federal taxpayers' suits based on the case or controversy limitation of article III or was it merely a judicially created rule of standing? The government contended that the former interpretation was compelled by the separation of powers doctrine, but after a close look at the concepts of "standing" and "justiciability," the Court firmly rejected this view:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of resolution. It is for this reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy' . . . .[53]

Having found no constitutional bar to federal taxpayers' suits, the Court struck down the *Frothingham* barrier insofar as it prevented challenges to federal appropriations which allegedly violated the establishment clause. Furthermore, the Court set out a "double nexus" test for determining whether a federal taxpayer has the requisite "personal stake in the outcome of the controversy"[54] to give him standing to contest a federal appropriation. First, the taxpayer must establish a logical nexus between his status as a taxpayer and the type of legislation he is attacking. Thus, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution."[55] Secondly, the taxpayer must demonstrate a nexus be-

[49] 392 U.S. 83 (1968).
[50] 20 U.S.C. §§ 241(a), 821-7 (Supp. II, 1965-66).
[51] Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y. 1967).
[52] *Id.* at 4.
[53] Flast v. Cohen, 392 U.S. 83, 100-01 (1968).
[54] *Id.* at 101, quoting Baker v. Carr, 369 U.S. 186, 204 (1962).
[55] Flast v. Cohen, 392 U.S. 83, 102 (1968).

tween his status as taxpayer and the type of constitutional infringement he alleges. That is, he must demonstrate that "the challenged enactment exceeds *specific constitutional limitations* imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[56] The Court then noted that in *Flast* the challenged appropriations were made under the taxing and spending power of Congress so the first nexus was established. It further concluded that the establishment clause historically constituted a "specific constitutional limitation" on Congress' taxing and spending power, so the second nexus was likewise present. Thus, the taxpayer-plaintiff was a proper party to contest the appropriations made under the Elementary and Secondary Education Act of 1965.

Although *Flast* was an eight-to-one decision, the Court was in fact united to this extent only on the question of whether the plaintiff had standing within the facts of the case. The Justices' views as to the desirability of further exceptions to the *Frothingham* rule differed greatly. The majority apparently envisioned additional exceptions, because Chief Justice Warren, speaking for the Court, noted that "specific constitutional limitations" on the congressional taxing and spending power other than the establishment clause could exist. Moreover, he concluded that taxpayers would be proper parties to insure that such limitations, should they be found to exist, are not breached by Congress. On the other hand, Justice Douglas felt that the "double nexus" test would not be a durable one and that the *Frothingham* rule should be abolished *in toto*.[57]

The remainder of the Court took a more restrictive view. In separate concurring opinions Justices Stewart and Fortas, although agreeing with the majority that Flast should be accorded standing to sue, hinted that they would not favor a further watering down of *Frothingham* by finding other specific constitutional limitations on congressional taxing and spending power.[58] And in a dissenting opinion Justice Harlan argued that even the inroad made by *Flast* went too far. Although he agreed that federal taxpayers' suits are within the purview of article III so as to give the federal courts jurisdiction over them, he felt that the policy[59] behind the *Frothingham* rule was sound and that the Court should decline to hear such cases unless specifically authorized to do so by Congress.[60]

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[56] *Id.* at 102-03. (Emphasis added.)

[57] *Id.* at 107 (Douglas, J., concurring).

[58] "[I] understand [the judgment and opinion of the Court] to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment." *Id.* at 114 (Stewart, J., concurring). "I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause." *Id.* at 115 (Fortas, J., concurring).

[59] *See* notes 72-79 *infra*, and accompanying text.

[60] An attempt was made to insert into the Elementary and Secondary Education Act, 20 U.S.C. §§ 241(a), 821-7 (Supp. II, 1965-66), a provision which would make federal aid to religious schools reviewable by the courts. See a discussion of these efforts in S. REP. No. 85, 90th Cong., 1st Sess. 2 (1967), and S. REP. No. 473, 90th Cong., 1st Sess. 10 (1967). However, the attempt was defeated.

Under the Administrative Procedure Act, 5 U.S.C. §§ 501-59 (Supp. II, 1965-66), "persons aggrieved" by the action of an administrative agency have standing to contest that action. Moreover, the Act has been interpreted to permit some "citizens' suits." Thus, in Scripps-Howard

A. *Some Implications of Flast v. Cohen*

The *Flast* test for determining taxpayer standing to contest federal appropriations is an extremely vague and flexible one, apparently designed to permit the Supreme Court to pick and choose from all federal appropriations those which it would like to review. A few very general guidelines are, however, available for predicting the Court's future course.

Under the "double nexus" test, a taxpayer has standing to contest only appropriations per se. The Court was careful to exclude from the ambit of taxpayer standing "incidental expenditures of tax funds in the administration of an essentially regulatory statute."[61] Thus, it appears that federal taxpayers still have no standing to contest such alleged establishments as prayer in the Armed Forces or in Congress because such activities do not directly involve an appropriation.[62]

A second premise which emerges with some clarity from *Flast* is that a federal taxpayer has standing to attack appropriations made under the congressional taxing and spending power on the ground that they violate the specific prohibition imposed by the establishment clause. However, it is not clear whether other constitutional bases exist for challenging appropriations. Since the Court distinguished *Flast* from *Frothingham*, it is implied the the due process clause of the fifth amendment, upon which Mrs. Frothingham based her claim, does not constitute a "specific constitutional limitation" on the taxing and spending power of Congress and, therefore, is no basis upon which a federal taxpayer can attack a federal appropriation.[63]

Any attempt to discern other "specific constitutional limitations" is purely conjectural. The Court stated that it will look to the substantive issues of each case in order to determine whether a particular appropriation is vulnerable to attack. Hence, the Court's opinion as to whether the appropriation is prohibited by a particular constitutional provision will ultimately determine whether a federal taxpayer has standing to sue.

One issue which is raised, and perhaps left unanswered, by *Flast* is the extent to which that case will affect the Supreme Court's earlier decision in *Doremus v. Board of Education*[64] with regard to state taxpayers' standing in federal court. Under the *Doremus* test, a state taxpayer will be granted standing if he demonstrates a "direct pecuniary injury"[65] resulting

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Radio, Inc. v. FCC, 316 U.S. 4 (1942) and FCC v. Sanders Bros. Radio Station, 309 U.S. 420 (1940), radio stations were held to have standing to sue as "a representative of the public interest." Scripps-Howard Radio, Inc. v. FCC, *supra*, at 14.

[61] Flast v. Cohen, 392 U.S. 83, 102 (1968).

[62] However, it is possible that taxpayers now have standing to contest the maintenance of congressional and military chaplains, since federal funds are appropriated to pay their salaries. But perhaps this question is political.

[63] The Court ostensibly did not treat the issue of whether the due process clause of the fifth amendment is such a "specific constitutional limitation." Rather, it distinguished *Frothingham* on the ground that "the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon the exercise of the taxing and spending power." Flast v. Cohen, 392 U.S. 83, 105 (1968).

[64] 342 U.S. 429 (1952).

[65] *Id.* at 434.

from a measurable disbursement of state funds. There is no requirement that the disbursement of funds be made under the taxing and spending power of the state, and it is unnecessary that the state taxpayer show that the disbursement violates some "specific constitutional limitation" on the state taxing and spending power. Conversely, a federal taxpayer must establish both of these facts in order to gain standing under the *Flast* test. Does the *Flast* decision mean that the Court intends to impose the stricter *Flast* standards on state taxpayers' suits in federal court? In *Flast*, the Court made no mention of state or municipal taxpayers' suits, except to note that the holding that federal taxpayers could contest only appropriations per se was "consistent"[66] with the *Doremus* limitations on state taxpayers' standing in federal court. This language implies that the Court may have rewritten the *Doremus* test, and perhaps in the future, state taxpayers' standing in federal court will be limited to attacks on appropriations per se. However, it seems unlikely that state taxpayers will have to meet the more difficult test of demonstrating that the state appropriation violates some "specific constitutional limitation" on the spending power of the state.

One final question merits attention. Are congressional actions other than spending now open to taxpayer attack? One which may be is the tax-exempt status of religion. The *Flast* Court stated that taxpayers can contest congressional "action" under the taxing and spending clause; thus it appears likely that taxpayers will have standing to challenge the constitutionality of the exemption of religious organizations from federal taxes.

B. *A Brief Critique and Some Theoretical Considerations of Flast v. Cohen*

The *Flast* standard for federal taxpayers' standing to challenge federal appropriations is, as Justice Harlan observed in his dissent,[67] wholly illogical. This is primarily because the test is predicated upon the fiction that a taxpayer is "personally" injured by an unconstitutional federal expenditure.[68] Since tax money is generally collected and expended for the benefit of all persons, without special regard for those who pay taxes, the taxpayer's interest in federal appropriations is no different from that of anyone else subject to the dominion of the United States. In reality then, Flast's claim was not that she was injured as a "taxpayer" due to unconstitutional appropriations, but that she was injured by the establishment of religion.[69]

However, even assuming *arguendo* that a federal taxpayer suffers a "personal" injury when the federal government spends tax money uncon-

[66] Flast v. Cohen, 392 U.S. 83, 102 (1968).

[67] *Id.* at 116 (Harlan, J., dissenting).

[68] *See* note 20 *supra*, and accompanying text.

[69] The *Flast* Court, however, did not adopt the theory that the establishment clause creates a personal constitutional right held by all citizens so that any citizen has standing to contest any establishment of religion. The argument is persuasive. Establishment, by its very nature, may affect no one "personally" in the traditional sense; yet the establishment clause sets out one of the basic concepts of our social structure—separation of church and state. Perhaps the Court did not go this far because it was unnecessary. Conventional plaintiffs are available to test most alleged establishments.

stitutionally, there is still no logical basis for the *Flast* requirements for taxpayer standing. Under the "double nexus" test, taxpayers have standing to contest only those appropriations which arise under the taxing and spending power of Congress as opposed to those which are incident to some other power. Implicit in this distinction is the assumption that the character of the taxpayer's injury varies according to the enumerated power which Congress happens to exercise in spending tax money. Such a distinction is indefensible. All that really matters to the taxpayer is that the money was spent unconstitutionally, and that the injury to the taxpayer from such spending either is or is not "personal."

The second aspect of the "double nexus" test may be similarly criticized. The nature of the taxpayer's injury is not determined by the constitutional provision which the federal spending violates. Thus, there is no basis for the *Flast* Court's ruling that a federal taxpayer is injured "personally" by a federal appropriation which transgresses the establishment clause of the first amendment but that he is not so injured by an appropriation which is violative of the due process clause of the fifth amendment.

Because the *Flast* standard is illogical, one may wonder why the Supreme Court adopted it. The answer probably lies in the vague tenets of "public policy." In *Flast* the Court apparently concluded that some federal appropriations should be subject to judicial review. To permit such review, the Court in effect created, although they certainly would never admit it, a "public action."[70] The theory of the "public action" is predicated upon the belief that a personally injured or affected plaintiff is not always necessary to a justiciable controversy. According to the "public action" rationale, which has always been rejected by the Supreme Court, a high degree of public interest in a particular matter may sometimes take the place of a personally injured plaintiff, creating the degree of adversity needed to make a matter fit for judicial determination, provided the other aspects of "justiciability" are present.[71] Thus, the *Flast* test can be explained as the Supreme Court's attempt to create a standing requirement which would permit a suit believed by the Court to be necessary at the present time, but which would prevent a generally available "public action" in which any citizen or taxpayer could contest virtually every action of the federal government.

The merits of a federal "public action" have been often debated, and two practical reasons for refusing to permit such suits were voiced in

[70] The term "public action" was created by Professor Jaffe. *See* Jaffe, *supra* note 13, at 1267:

> The problem of standing is twofold. Let us denominate the two types of suit broadly as 'public' and 'private,' although the line betweeen the two cannot be conceived absolutely. The plaintiff asserting a 'public' right may be affected no differently from any other person. This would be the broadest possible category of potential plaintiffs. A shade narrower is the category of 'citizen;' and the category of 'taxpayer' will include some who are and some who are not 'citizens.' Yet an action by any of these can properly be thought of and evaluated as a public action.

[71] Professor Jaffe defines the criteria of justiciability as: "the intensity of the plaintiff's claim to justice (standing); the degree and legitimacy of the public's claim to a solution (public interest); the clarity with which the issues have emerged so as to be seen in all their bearings (ripeness); the possibility of deriving a governing rule from authoritative norms and of forming an enforceable decree (political question)." Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 304 (1961).

Frothingham v. Mellon.[72] There the Court noted that "[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same. . . . The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the result which we have reached, that a suit of this character cannot be maintained."[73] This language gives expression to two distinct fears: (1) the overcrowding of the courts, and (2) delay in the administration of the federal government.

The argument that federal "public actions" will overcrowd the courts is unimpressive. The excuse of crowded courtrooms is poor reason for denying the vindication of constitutional rights. Moreover, whether recognition of a federal "public action" would overburden the courts at all is debatable.[74] What evidence there is suggests that it would not,[75] and modern joinder and class action provisions further weaken the argument.[76]

The contention that "public actions" at the federal level would delay the administration of the federal government is likewise not supported by analysis. Proponents of the *Frothingham* view argue that the very federal programs likely to be hit hardest by federal "public actions" would be those in which expediency is essential: foreign affairs and national defense.[77] However, these areas surely are "political" in nature and therefore not justiciable. Thus there is no need to resort to the "standing" doctrine to keep suits over foreign affairs and national defense out of court. On the other hand, some delay in administration likely would be encountered in areas which cannot be disposed of by the "political question" doctrine. Yet a small amount of delay has not seriously affected state or municipal government administration, and it is probable that such delay would not inconvenience the federal government to any great extent.

Although the arguments favoring the *Frothingham* rule are not persuasive, enthusiasm for a generally available federal "public action" should be tempered by two considerations. First, the "public action" is needed less at the federal level of government than at the local level.[78] The function of a generally available "public action" is to control the actions of the government; hence such a suit is most desirable when other political control over governmental misconduct (*i.e.*, the electorate) is weak and ineffective. Since electoral control, because of its great dependence upon publicity, works more effectively at the national level of government than at the local level,[79] the need for the added control afforded by the "public action" is

[72] 262 U.S. 447 (1923).

[73] *Id.* at 487.

[74] *See* Davis, *supra* note 42, at 665:

> Arguments that the courts would be flooded with taxpayer suits if taxpayers could challenge expenditures are based on a misunderstanding. The Court could, and would in early cases, establish the constitutionality of basic spending programs, putting to rest through enunciation of principles more than nine-tenths of potential problems. The judicial doors would then be open for the special problems, such as the validity of federal aid to parochial schools. The long-term effect on the volume of litigation would be slight.

[75] The only evidence of any consequence is that no state which allows taxpayer actions has retreated from this position.

[76] This fact was specifically noted by the Court in Flast v. Cohen, 392 U.S. 83, 94 (1968).

[77] *See* Comment, *supra* note 13; Jaffe, *supra* note 13.

[78] *See* Jaffe, *supra* note 13, at 1283-84.

[79] *Id.*

much less.

The second consideration which dictates against a generally available federal "public action" is that the practical principle underlying the traditional standing doctrine is still a viable one. The requirement of a "personally" injured or affected plaintiff insures that lawsuits will be adversary in nature so that the issues will be most clearly before the court.[80] Consequently, the view adopted by the *Flast* Court—that a few pressing "public rights" may be litigated but that a generally available "public action" will not be permitted—appears to be the better approach. With this fact in mind, the Court's formulation of an illogical, flexible standing requirement was proper. In this way, the Court will be able to make an independent determination of the justiciability of each new case as it arises.

VII. Conclusion

In *Flast*, the Court probably was persuaded to allow the suit partly out of sympathy for what seemed to be a "right without a remedy." The Court had implied previously that the establishment clause could be violated without affecting anyone personally,[81] and the *Flast* majority apparently found the potential for such a situation in federal appropriations to religious schools. Thus the Court manipulated the flexible concept of "standing to sue" in order to permit such appropriations to be tested in court.

However, it should be noted that *Flast* does not bind the Supreme Court to review the constitutionality of federal aid to education or any other federal appropriation. As the Court observed, a ruling that the plaintiff has "standing to sue" does not require a subsequent determination that a particular matter is "justiciable."[82] Hence, the Court could still refuse to entertain taxpayer challenges to federal appropriations, including payments to religious schools, on the ground that they constitute a "political question" committed to Congress for determination. Nevertheless, the Court's failure to dismiss *Flast* strongly suggests that the Court does not consider congressional appropriations to religious schools political in character, although it may well determine that some other spending programs (*i.e.*, foreign aid and national defense) do create political questions.

Perhaps it is well that the issues of religious tax exemption and federal aid to education may soon be before the courts. Both of these practices are thought to constitute establishment of religion by a respectable number of people. Such heatedly contested issues should not be relegated to the ruminative writings of legal theoreticians; rather, they deserve the final adjudication which results from a court decision.

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[80] *See* note 4 *supra*.

[81] In Engel v. Vitale, 370 U.S. 421 (1962), the Court stated that the establishment clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion *whether those laws operate directly to coerce nonobserving individuals or not.*" *Id.* at 430 (emphasis added).

[82] *See* note 53 *supra*, and accompanying text.